

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DEBORAH VATCHER	:	DETERMINATION DTA NO. 819505
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period September 1, 2000 through November 30, 2000.	:	

Petitioner, Deborah Vatcher, 4301 E. Abraham Lane, Phoenix, Arizona 85050-6896, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2000 through November 30, 2000.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 25, 2004 at 10:30 A.M., with all briefs to be submitted by May 21, 2004, which date began the six-month period for the issuance of this determination. Petitioner appeared by Harvey H. Mendelsohn, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Michael P. McKinley, Esq., of counsel).

ISSUE

Whether petitioner, as an employee who performed administrative and fiscal duties, including tax reporting and bill paying, for a company owned by her mother and stepfather, was a person required to collect tax under Tax Law § 1131(1) so that she is personally liable for sales tax determined due from this company.

FINDINGS OF FACT

1. The Division of Taxation (“Division”), by its Tax Compliance Division- Bankruptcy, issued a Notice of Determination dated June 13, 2002 against petitioner, Deborah Vatcher, as an officer or responsible person of Donmyr Investments, LLC. (“Donmyr”),¹ asserting sales and use tax due of \$114,852.30 plus penalty and interest for the sales tax quarter ending November 30, 2000.

2. Donmyr owned and operated Midas muffler shops, as a franchisee, at 16 locations in Nassau and Suffolk counties on Long Island.² A Nevada limited liability company, it held its organizational meeting on December 8, 1998 at which time Donald Otto and Myrtle Otto, each holding a 50% ownership interest, were elected and qualified as operating manager and secretary, respectively, of the company. Donmyr bore the first syllable of each of the given names of Mr. and Mrs. Otto, i.e., Don and Myr. Petitioner, Deborah Vatcher, is the daughter of Myrtle Otto and the stepdaughter of Mr. Otto.

3. During the sales tax quarter ending November 30, 2000, the company had approximately 7,500 sales invoices representing gross sales and services of \$2,236,499.00. On its quarterly sales tax return for this period, Donmyr reported partial payment of \$63,512.53 on total sales and use tax due for the quarter of \$178,364.83, as calculated on taxable sales for the quarter of \$2,129,487.00, leaving a balance due of \$114,852.30. The Division has not contested

¹ Donmyr Investments, LLC filed a petition for bankruptcy under chapter 11 of the United States Bankruptcy Code on or about December 1, 2000.

² The parties asserted that Donmyr operated Midas muffler shops throughout New York City and Long Island. However, the company’s sales tax returns for the period at issue reflect the collection of sales tax in only Nassau and Suffolk counties. There is no explanation in the record concerning this variance.

the amount of the company's reported taxable sales, and its Notice of Determination dated June 13, 2002, as detailed in Finding of Fact "1", asserts tax due of \$114,852.30, in conformance with the balance shown due on Donmyr's sales and use tax return for the quarter at issue.

4. Petitioner, as controller of Donmyr, signed sales tax returns for the company including the returns for the period at issue: (i) for the quarter ending November 30, 2000, (ii) for the part quarterly return for the period September 1-30, 2000, and (iii) for the part quarterly return for the period October 1-31, 2000, as well as the returns for the periods immediately prior to and subsequent to the tax quarter at issue, i.e.: (i) for the period June 1-August 31, 2000, and (ii) December 1-31, 2000. She also signed, as controller of Donmyr, the Amended Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return for the period October 1-December 31, 1999, which showed total remuneration paid during such quarter of \$841,475.00.

5. Prior to the period at issue, petitioner, as controller of Donmyr, communicated with the Division's Tax Compliance Division by letters directed "To Whom It May Concern." In a letter dated February 15, 2000, she requested the abatement of penalties imposed by the Division for the period December 1, 1998 to February 28, 1999, and in a letter dated May 8, 2000, she explained errors Donmyr made on its sales tax returns for the period September 1 through November 30, 1999. After the period at issue, petitioner, as controller of Donmyr, completed an audit questionnaire dated August 25, 2001. In response to the question, "Are there seasonal or other fluctuations in sales," petitioner checked the box for "yes" and explained: "summer is *our* 'season' - typically" (emphasis added).

6. Petitioner was an authorized signatory on Donmyr's Citibank checking accounts (account numbers 95724836 and 03386674). She signed checks drawn on Citibank account

number 95724836 for lease payments to Key Bank USA which were dated both before and after the period at issue. On the Title of Account for account number 95724836, she signed as “sec/treas,” Myrtle Otto signed as “VP” and Donald Otto as “Pres.” On the Title of Account for account number 03386674, she signed as “sec,” Myrtle Otto as “VP” and Donald Otto as “Pres.”

7. Petitioner earned wages subject to social security tax from Donmyr of \$67,788.57 in 1999 and \$75,000.12 in 2000, which represented nearly all of her reported income for these years.

8. The Division has proposed findings of fact in a narrative format, relevant portions of which have been incorporated herein. Although State Administrative Procedure Act § 307(1) requires a ruling “upon *each* proposed finding of fact [emphasis added],” since the Division has not separately numbered each of its proposed findings of fact, they have not been so ruled upon.

SUMMARY OF THE PARTIES’ POSITIONS

9. Petitioner argues that she is not a responsible person concerning the sales tax liability of Donmyr because she “was never an officer, a member, a shareholder or partner in Donmyr.” Petitioner contends she signed checks on behalf of Donmyr “as the bookkeeper” and not as someone who could determine “who was to be paid and when payments were to be made.” Rather, petitioner asserts she “followed instructions from ownership” who frequently were away from New York in Arizona, and for “convenience,” they had petitioner sign checks for the company.

10. The Division counters that petitioner “held herself out as being authorized to act for Donmyr” by signing tax returns, writing letters to the Division, signing checks, identifying herself to the Division as the company’s contact person, and identifying herself as the company’s “sec/treas” to Citibank. The Division emphasizes that petitioner failed to offer evidence to

explain her role in the company other than the testimony of her representative who lacked any personal knowledge of her role in the business and was retained by petitioner after the period at issue. The Division rejects petitioner's contention that she proved she was not an officer of Donmyr, and in any event, it emphasizes that an individual can be a responsible person without being an officer. Further, according to the Division, petitioner made no showing of reasonable cause for penalty abatement.

CONCLUSIONS OF LAW

A. Petitioner is mistaken in her belief that a mere employee may not be determined to be a person required to collect sales tax on behalf of a business entity and thereby may be held personally liable for sales tax required to be so collected. Tax Law § 1131(1) expansively defines "persons required to collect [sales] tax" to include an employee of a business entity as follows:

[E]very vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or *employee* of a corporation or of a dissolved corporation, any *employee* of a partnership, . . . or any *employee* of an individual proprietorship who as such officer, director, *employee* or manager is under a duty to act for such corporation, partnership, . . . or individual proprietorship in complying with any requirement of this article; and any member of a partnership . . . (emphasis added).

B. The determination of whether an individual is a person under a duty to act for a business operation is based upon a close examination of the particular facts of the case. In ***Matter of Moschetto*** (Tax Appeals Tribunal, March 17, 1994), the Tribunal reaffirmed the standard articulated in ***Matter of Constantino*** (Tax Appeals Tribunal, September 27, 1990):

The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder;

authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation.

C. As noted in the Findings of Fact, petitioner, as an employee of her parents' business, designated herself the controller of Donmyr on sales tax returns and on a withholding, wage reporting and unemployment insurance return which she signed on behalf of the enterprise. Further, the record establishes that petitioner assumed other tasks or functions as a consequence of her employment by the Midas franchise business including performing the role of contact person or liaison between the business and the Division of Taxation, requesting abatement of penalties for a prior period ending in early 1999 and explaining errors on sales tax returns for another period ending in late 1999. She was also the individual who on behalf of the enterprise provided detailed answers to an audit questionnaire and, as noted in Finding of Fact "5", referred to the enterprise in a possessive fashion.

D. Of the six factors delineated by the Tax Appeals Tribunal in *Matter of Constantino (supra)* as indicia of responsibility, two were established by documents introduced into evidence by the Division: (1) petitioner was authorized to write checks on behalf of the business, and (2) she signed tax returns for the business. The Division also established that petitioner received wages from the business of \$67,788.57 in 1999 and \$75,000.12 in 2000, which reflects an economic interest in the business. However, since the sales for the business during the quarter at issue were over \$2,000,000.00, petitioner's salary level is not that substantial to be an important indicia of responsibility (*cf.*, *Matter of Moschetto, supra* [wherein the Tribunal noted that the officer received the same salary after he became a shareholder as he had when he was only a manager of service and parts and the amount of income received of \$600.00 a week in 1987

through 1989, did not suggest that he was a responsible officer when the sales tax asserted due was approximately \$400,000.00]).

E. Although such facts established by the parties do not, in any way, provide a basis to understand the enterprise's business operation and petitioner's role in it in a *thorough* fashion, it was petitioner's burden to bring out additional facts so as to prove that she was not a person under a duty to act for Donmyr (*see, Matter of Orvis*, Tax Appeals Tribunal, January 14, 1993, ***annulled in part*** 204 AD2d 916, 612 NYS2d 503, ***modified*** 86 NY2d 165, 630 NYS2d 680, ***cert denied*** 516 US 989, 133 L Ed 2d 426 [wherein the Tribunal noted that the Division of Taxation does not have the burden of proving the propriety of its assessment, but rather the failure of the petitioner in Orvis to "establish the specific fact" required the Tribunal to "conclude that petitioner has not sustained its burden"]]). Petitioner failed to bring out such additional facts. Neither petitioner nor any witness with personal knowledge of the operations of Donmyr testified at the hearing. The contentions by petitioner's representative that she merely "followed instructions from ownership," i.e., her parents, and that she signed checks for "convenience" and did not determine "who was to be paid and when payments were to be made" simply were not proven by petitioner. Consequently, although it might be somewhat unusual for an employee, rather than an officer or owner of an enterprise, to be held to have a duty to act for a business in complying with the requirements of the sales tax law, it is certainly not an impossibility given the expansive statutory definition detailed in Conclusion of Law "A". In sum, petitioner must suffer the consequences of her failure of proof (*cf, Matter of Meixsell v. Commissioner of Taxation*, 240 AD2d 860, 659 NYS2d 325, ***lv denied*** 91 NY2d 811, 671 NYS2d 714).

F. Furthermore, although petitioner's mother or stepfather might be viewed as also responsible for the collection and remittance of Donmyr's sales tax, petitioner's responsibility

for the collection and remittance of such tax remains intact as discussed above (*see, Matter of Martin v. Commissioner of Taxation*, 162 AD2d 890, 558 NYS2d 239; *Matter of Bailey*, Tax Appeals Tribunal, November 24, 1993).

G. Finally, petitioner offered no proof that Donmyr's failure to pay sales tax, which it had collected in trust on behalf of the State, on a timely basis was due to reasonable cause and not due to willful neglect. Therefore, penalty is sustained (*see, Matter of Disanco Home Center Corp.*, Tax Appeals Tribunal, February 16, 1989).

H. The petition of Deborah Vatcher is denied, and the Notice of Determination dated June 13, 2002 is sustained.

DATED: Troy, New York
August 19, 2004

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE